DOCUMENT RESUME

ED 471 736 HE 035 569

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TITLE	Should Affirmative Action Be a Factor in Admissions for Higher Education?
PUB DATE	2002-00-00
NOTE	22p.
PUB TYPE	Reports - Evaluative (142)
EDRS PRICE	EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS	*Affirmative Action; *College Admission; *Diversity (Student); *Higher Education; *Racial Factors; *Selective Admission

ABSTRACT

Selective higher education institutions using race-sensitive criteria as a basis for admissions risk litigation by nonminority applicants with impressive test scores and class rank who find themselves denied admission. Are the benefits of a diverse student body worth the risk? In an ever increasingly diverse population, this paper concludes the end justifies the means. There is more than enough evidence to support the benefits of diversity on campus for all students. The use of affirmative action helps higher education achieve the goal of providing the best possible learning environment for everyone. (Contains 29 references.) (SLD)

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Running head: AFFIRMATIVE ACTION IN HIGHER EDUCATION

ED 471 736

Should Affirmative Action be a Factor in Admissions for Higher Education?

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Abstract

Selective higher education institutions using race-sensitive criteria as a basis for admissions risk litigation by nonminority applicants with impressive test scores and class-rank who find themselves denied admission. Are the benefits of a diverse student body worth the risk? In an ever-increasingly diverse population, the author concludes the end justifies the means.

Should Affirmative Action be a Factor in

Admissions for Higher Education?

Of all the issues facing higher education in 2002, none seem more potentially volatile than the practice of admitting students based on criteria outside of grade point average and standardized test results. In California, Texas and Maryland, college affirmative action programs have been abolished and the number of underrepresented minority students may drop at some of the most selective institutions as a result of this action. Defenders of a race-sensitive admissions policy feel that the action is justified by the need to atone for years of oppression and ongoing discrimination in society. It is not uncommon for admissions officers to look beyond candidates' test scores and grades by considering athletes and legacies as criteria for acceptance. They argue that admitting a diverse class gives students of all races better preparation for living and working in an increasingly diverse society (Bowen & Bok, p. xxiv).

Critics of a race-conscious admissions policy for selective institutions maintain that it is fundamentally wrong to place nonminority applicants with good grades and high test scores behind minority candidates with equal or less impressive grades and test scores on the basis of race. They suggest that admissions officers could end up accepting minority students who are not disadvantaged, but actually come from wealthier and more privileged lifestyles than those being rejected. Some also feel that by admitting students with less-impressive credentials, one is actually stigmatizing and demoralizing minority students by forcing them to compete with classmates of greater academic ability. Overall, critics claim that race-sensitive policies accentuate racial differences, intensify prejudice and impede progress toward a color-blind society (Ibid., p. xxiii).

Literature Review

To fully understand affirmative action, one needs to begin by reviewing its origin. The concept was introduced in 1941 by President Franklin D. Roosevelt in Executive Order 8802 which stated there should not be discrimination in employment in the defense industry or government because of race, creed, color, or national origin. It was assumed that blacks were the intention of this action (Skrentny). The term "affirmative action" first appeared in President John F. Kennedy's Executive Order 10925, and was repeated in 1964 by President Lyndon B. Johnson's Executive Order 11246 which encouraged, "affirmative action to ensure that applicants are employed, and that applicants are treated during employment, without regard to their race, creed, color, or national origin" (Ibid.). That same year, the Civil Rights Act was passed and two offices were created to enforce non-discrimination: the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance. One of the challenges that goes with discussing affirmative action is that it groups together a large number of differing areas and programs, i.e., awarding contracts to minority-owned businesses, policies for hiring and promoting, and, for purposes of review in this paper, admissions policies in higher education.

The question of who should go to college has long been debated. If one assumes that educational attainment should have an effect on financial and professional success, then a strong case can be made for ensuring access to public higher education for everyone. Unfortunately, our nation has a long history of treating people differently because of their race.

The height of segregation was the decision in *Plessy v. Ferguson* (1896) that stated an 1890 Louisiana law called "An Act to Promote the Comfort for Passengers" by

providing separate-but-equal accommodations on passenger trains for whites and people of color was constitutional and applied to education. At that point, the Equal Protection Clause of the Fourteenth Amendment had become subject to custom and tradition no matter how clearly the law affected a particular classification of people (Alexander & Alexander).

The Supreme Court ruling in *Brown v. Board of Education of Topeka* (1954) was the first major step toward school desegregation in the South (Bickel). Linda Brown had been forced to travel twenty-one blocks to attend an all black school despite living only two blocks from a local school. The National Association for the Advancement of Colored People (NAACP) saw this as an opportunity to challenge the "separate but equal" doctrine and filed a brief on behalf of the Brown family arguing that the Fourteenth Amendment indicated that the policy established by *Plessy* was unconstitutional. The court ordered immediate desegregation of public schools, and for the first time in the nation's history, blacks would be admitted to Southern white schools (Ibid.).

In 1955, Martin Luther King led efforts to desegregate public transportation, schools, and places of public accommodation in the South. By the mid-1960s, there was a rising concern over civil rights and a few Northeast colleges and universities began actively recruiting students of color. However, the number of minorities actually enrolled in select institutions in New England made up only one percent of the total student population leading schools to review their standards for admission and financial aid (Bowen & Bok).

In 1965, the Harvard Law School unveiled a special summer program for juniors from historically black colleges to interest them in law. One year later, the school began enrolling black students with test scores below those of white classmates. Soon, a number of the leading colleges and universities realized that besides having a role to play in educating minority students, they also wanted to enrich the education of all students by including race as a criterion for admission so as to develop a diverse student population with varying talents, backgrounds and perspectives. Their efforts began to pay off as the percentage of blacks enrolled in Ivy League Colleges rose from 2.3 percent in 1967 to 6.3 percent in 1976 (Ibid.).

In June 1978, the U.S. Supreme Court heard the case of *Regents of the University of California v. Bakke* (1978), regarding a charge of reverse discrimination. Bakke alleged that the medical school's special admissions program excluded him from the school because of his race in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The Court found that the admissions program implemented a racial quota by designating sixteen places in the class of one hundred as reserved for minority applicants. The Court held that the Equal Protection Clause requires that no applicant can be rejected because of race in favor of another person less qualified, as measured by standards applied without regard to race. Justice Lewis Powell wrote that the purpose of helping a group perceived to be the victims of general societal discrimination does not justify a classification that imposes disadvantages upon other individuals who are not responsible for whatever harm the alleged victims of societal discrimination have suffered. Although Justice Powell

emphasized the compelling nature of the state's interest in attaining the goal of a heterogeneous student body, especially in an area like medicine which serves a heterogeneous population, the special admissions program focused only upon ethnic diversity rather than a competitive consideration for race or ethnicity similar to Harvard's admission program. The Harvard admissions process considered race and ethnicity, educational experience and performance, personal talents, work or service experience, leadership potential, maturity, demonstrated compassion, history of overcoming disadvantage, ability to communicate with the poor, or other important qualifications. This kind of competitive consideration of a variety of relevant qualities and characteristics allowed the institution to preserve discretion in determining the diversity of its student body without explicit racial classification. The Court ordered Bakke's admission to the California medical school (*The College Administrator and the Courts*, pp. 5/61-64).

In 1981, The California Supreme Court heard the case of *DeRonde v. Regents of University of California* (1981). DeRonde was an unsuccessful applicant to the University of California-Davis Law School who challenged the admissions policies. The school received over 2,000 applications and accepted over 400 students into the freshman class. The formula used for admission considered grade point average (GPA) and Law School Admission Test (LSAT) scores, combined with several factors including ethnic minority status. The school's position was that bringing minority students into the classroom was a valuable cultural experience for everyone and increasing the number of minorities would enhance their participation in the democratic process. There were no quotas or a fixed number of spaces for minorities. Although there were 69 minorities

accepted who had lower overall scores than DeRonde, there were over 800 rejected applicants, including 35 minorities, with higher scores. The California Supreme Court ruled that the consideration of ethnic minority status as one of several factors in the admissions criteria did not violate the equal protection provisions of the Constitution. The Court looked to *Bakke* in making its decision and particularly Justice Powell's reference to the Harvard Plan that considered ethnic background as "a plus," but did not set up a quota (*The College Administrator and the Courts* 5/65-66).

For many years following the Civil Rights Act of 1964, the Department of Education allowed higher education institutions to take race into account to a greater extent in financial aid awards than admissions, as long as the aid earmarked for minorities represented less than 50 percent of the total aid program. In 1990, the Bush Administration said that race could only be used as a "plus factor" in decisions concerning financial aid awards. After hearing from the American Council on Education (ACE) and other associations in defense of minority-targeted aid programs, the Clinton Administration returned to the more permissive pre-1990 policies. However, the University of Maryland's Banneker Scholarships – which were initiated in response to a federal investigation of discrimination against blacks – were declared by a circuit court to be unlawful because they were limited to blacks, as found in the case of *Podberesky v. Kirwan II* (1994) (American Council on Education 2001).

In 1996, the Court of Appeals for the Fifth Circuit ruled in *Hopwood v. Texas* (1996) that the University of Texas Law School could not consider race for admissions unless it was necessary to remedy past discrimination (Bowen & Bok). Cheryl Hopwood, the mother of a child with cerebral palsy, could have used her unique situation as a factor

for consideration for admission by the school, but she did not. She provided no letters of recommendation and no personal statement that could have possibly made a difference in the school's decision for admission. Instead, she was convinced that she was displaced from her rightful place by lesser-qualified minorities (Altbach, Berdahl, & Gumport). The Court ruled that the law school's admissions plan considered white and minority applicants on separate tracks in order to increase the number of minority students admitted. The Court held that the school could no longer use race and ethnicity as factors. Judge Jerry Smith said that using race to pick students "makes no more sense than choosing by blood type" ("The Hopwood effect," 1996).

In 1995, the Board of Regents of the University of California voted to eliminate the use of racial preferences in hiring and admissions decisions. In 1996, California voters approved Proposition 209, making the affirmative action ban statewide. At two of California's most selective institutions, The University of California at Berkeley and The University of California at Los Angeles (UCLA), the total number of minority students began to drop significantly. By 1999, admission levels of underrepresented minorities – blacks, Hispanics, and Native Americans – dropped below where they were prior to Proposition 209, i.e., at Berkeley down 44 percent and UCLA down 36 percent. The law schools at Berkeley and UCLA also showed drops in their underrepresented minority student pools over the same period, i.e., 44 percent and 69 percent respectively (Cantor, 1999). Although the overall number of underrepresented minority students at some of the universities within the California system have risen, they have dropped significantly at the most selective schools. This data is cause for concern since research suggests that minority students attending selective universities are more likely to graduate than

minority students at less-selective universities with similar Scholastic Aptitude Test scores (Bowen & Bok).

Problem Analysis

In response to higher education admissions policies being placed in the national spotlight for possible litigation, California, Texas, and Florida initiated plans allowing a percentage of the top students in each high school admission to state universities: California's plan is four percent, the Texas plan is 10 percent, and Florida's plan is 20 percent. The primary complaint against "X Percent" plans is that they may penalize students at the more demanding secondary schools where those not making the top percent are still better prepared for college than students in the top "X Percent" at other high schools. Further, admitting less-qualified students into the most selective institutions may end up leaving them struggling for survival in classes more difficult than they are equipped to handle. Finally, high school students with a promise of guaranteed admission could be more inclined to stay away from the most rigorous classes or more demanding high schools for fear of jeopardizing their class rank. Clearly, "X Percent" systems are not the perfect solution to balancing minority enrollments in higher education; they may end up making great academic public institutions less competitive.

According to a recent report by the U.S. Commission on Civil Rights, "X Percent" plans are not improving the representation of minority students at public colleges and universities. The commission urges more effort be made toward academic outreach and financial support for minority and disadvantaged students rather than continuation of percentage plans (Hebel, 2002).

Perhaps the most outspoken critics of race-sensitive admissions policies are representatives of the Center for Individual Rights (CIR), a special-interest legal organization funded by private sources that challenged and won the *Hopwood* case, and represented the sponsors of Proposition 209. In 1998, CIR challenged the University of Michigan's admission policies at both its chief undergraduate college (*Gratz v. Bollinger)* and law school (*Grutter v. Bollinger*). At issue is a scoring system that gives black, Hispanic and American Indians a 20-point bonus. The university's law school admissions policy has been in place since 1992. A University of Michigan statistician said that 35% of the minorities who applied to the school in 2000 were admitted; without racial preferences, only 10% would have been accepted (Marklein, 2001). The law school had an unwritten policy to enroll a "critical mass" of underrepresented minority students (which over the years had meant 10-17 percent of the members of the graduating class) although their LSAT scores and grade point averages were much lower, on average, than those of the rest of the class. University officials could not adequately define "critical mass" to the satisfaction of the court. In 1995, all black applicants with minimum LSAT scores of 159 to 160 and GPAs of 3.0 or better were admitted; yet, only 1 of 54 Asian applicants and 4 of 190 white applicants with the same qualifications were accepted. Appeals courts have upheld the university's policies.

What makes both University of Michigan cases so interesting to this writer is the fact that the same year Grutter was denied admission, 23 other white applicants were admitted to the law school despite lower grade point averages and test scores. Similarly, the year Gratz was rejected, 42 whites or Asians (whom the university refers to as "non-underrepresented minorities") were admitted with lower grades and test score

results (Page, 2002). Although the university uses a "selection index" of up to 150 points primarily based on academic factors, twenty points may be granted for one of the following: membership in an underrepresented minority group, socioeconomic disadvantage, athletic ability, or graduation from a predominantly minority high school (Greenhouse, 2002). The university maintains that despite outreach and recruitment efforts, the percentage of minority applicants at the top range of grades and test scores would fall below three percent with a "race-blind lottery." As of today, 6.7% of the law school students are black and 4.4% are Hispanic (Ibid.).

Though the U. S. Supreme Court has not ruled on affirmative action in higher education since *Bakke*, opponents to the Michigan policies recently asked the Supreme Court to hear both of these cases ("Opponents ask Supreme Court," 2002). Fortunately, on December 2, 2002, the court announced that it would review both cases in 2003 (Ibid.).

A key to the Michigan defense has been testimony by Professor Patricia Gurin regarding research suggesting that college students (both minority and nonminority) learn better when the learning takes place in a setting where they are confronted by others different from themselves. Professor Gurin has found that students who experience the most racial and ethnic diversity in classroom settings and informal interactions with peers, show the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills. Further, "when educated in a diverse environment, students are better able to understand and consider multiple perspectives, deal with conflicts which different perspectives

sometimes create, and appreciate common values and integrative forces that harness differences in pursuit of the common good" (Gurin, 1999).

Gurin's testimony appears consistent with conclusions presented in 1993 by Alexander W. Astin: (1) "Cognitive and affective outcomes are affected by institutional diversity policies and activities" (Astin, pp. 430-1), and (2) "Enhancing institutional emphasis on diversity may increase retention rates" (Ibid., p. 300). Further, data from the latest "National Survey of Student Engagement" showed that students who experience diversity report high levels of engagement; more progress in personal and educational growth; were more involved in active and collaborative learning; and more satisfaction with their college experience ("Transfer students feel disengaged", 2002). George Kuh, a professor of higher education at Indiana University at Bloomington, stated, "The bottom line is that diversity is good. It's good for all kinds of reasons, not just being exposed to different people" (Ibid.).

Support for the University of Michigan has been widespread both within and beyond the institution. Nearly 700 faculty signed an affirmative action statement describing the university's policies as "essential in promoting equal access to education, improving the quality of education for all students, and contributing to equality of opportunity in the society at large" (Gurin, 1999). On October 16, 2000, twenty of America's largest Fortune 500 Corporations filed a legal brief supporting the university's admissions policies by maintaining that graduates from institutions with diverse student bodies are more equipped to understand, learn from and collaborate with others from a variety of racial, ethnic and cultural backgrounds; demonstrate creative problem solving by integrating differing perspectives; exhibit the skills required for good teamwork; and

demonstrate more effective responsiveness to the needs of all types of consumers ("University of Michigan's two affirmative action lawsuits," 2001) .

In July 2001, Dr. Richard C. Atkinson, president of the University of California, proposed extending offers of admissions to students in the top 12.5 percent of every high school graduating class in the State if the students completed two years at a California community college first. The plan is now on hold due to a lack of state funds. He also proposed dropping the requirement that applicants take the SAT, the most widely used college-entrance exam. He said it was taking up too much of students' time and money and noted it had been criticized as unfair to minorities ("University of California president to retire," 2002).

A key point to consider when discussing affirmative action in higher education is the degree to which a white student's chances of being admitted to a selective institution are hurt by using a race-conscious system. In their book, *The Shape of the River: Long-term Consequences of Considering Race in College and University Admissions*, Bowen and Bok (1998) determined that even if all selective universities used a race-blind admissions systems, the probability of being admitted by a white student would go only from 25 percent to 26.2 percent (Bowen & Bok).

Bowen and Bok also provide data supporting the need for continuation of affirmative action in higher education by sharing results from their research using a database called "College and Beyond" (C & B) concerning 80,000 white and black students who entered 28 selective colleges and universities in 1951, 1976 and 1989. The colleges and universities whose matriculates were in the database were Barnard College, Bryn Mawr College, Denison University, Hamilton College, Kenyon College, Oberlin

College, Smith College, Swarthmore College, Wellelsey College, Wesleyan University, Williams College, Columbia, Duke, Emory, Miami (Ohio), Northwestern, Pennsylvania State, Princeton, Rice, Stanford, Tufts, Tulane, University of Michigan at Ann Arbor, University of North Carolina at Chapel Hill, Pennsylvania, Vanderbilt, Washington, and Yale (Bowen & Bok pp. xxvii-xxx).

The schools were divided into three groups according to their degree of selectivity as measured by SAT scores of their freshmen. Data regarding each student's race, gender, test scores, rank in high school class, and, for many, information about family background were available. Also recorded were students' graduation status, grade point average, and whether they participated in athletics or other time-intensive extracurricular activities. For many matriculates, survey information was available describing their advanced degree earned, sector of employment, occupation, earned income and family income, involvement in civic activities, marital status and number of children. They were asked to respond to questions like where else they applied to college and if admitted, if the school they attended was their first choice, and their overall satisfaction with college and life afterwards. For the 1989 graduates, questions were asked about the extent to which they interacted with individuals of different races, political outlooks, socioeconomic backgrounds, and geographic origins. Overall, Bowen and Bok concluded that blacks who might not have been admitted to select institutions without the use of race-sensitive admissions policies have been successful in life and are often among the leaders in community and civic organizations.

From the beginning of the civil rights movement to today, the percentage of black students graduating from colleges and professional schools has grown tremendously.

From 1960 to 1995, the percentage of blacks aged 25 to 29 graduating from college went from 5.4 percent to 15.4 percent. For the same period in the nation's law schools, the percentage of blacks grew from 1 percent to 7.5 percent, and for medical schools, the percentage rose from 2.2 to 8.1 percent. Data on Hispanics is not available prior to 1970, however, from 1970 to 1995, the percentage of Hispanics aged 25 or older with a college degree grew from 4.5 to 9.3 percent; since 1981, their share of professional and doctoral degrees has doubled. The Educational Testing Service recently reported that African American, Hispanic and Asian/Pacific Islander students will account for 80 percent of the increase in undergraduates by 2015 ("Projected enrollment growth," 2002).

These trends will hopefully continue and lead to a much greater representation of minorities in profitable and influential occupations. From 1960 to 1995, the percentage of black male professionals grew from 3.8 to 8.6 percent; for females, the gain was from six percent to 13.1 percent. For black executives, managers and administrators during the same time frame, the percentage rose from three percent to 8.3 percent for males and from 1.8 to 9.6 percent for females. From 1960 to 1990, African Americans doubled their share of physicians and tripled their share of attorneys and engineers. From 1965 to 1995, black representation in Congress grew from four to 41 members. The total number of black elected officials in 1965 was 280; by 1993, the number had risen to 7,984. Hispanics also made a dramatic impact in these areas: from 1983 to 1996, their share of executives, managers and administrators went from 2.8 percent to 4.8 percent and the proportion of professionals from 2.5 to 4.3 percent (Bowen & Bok).

Recommendation

Despite encouraging data collected by the U.S. Bureau of the Census and reported by Bowen and Bok, many of us in higher education realize that we have a long road to travel when it comes to respectful race relations and opportunities for positive social change. Advocates of race-sensitive admissions policies at selective colleges and universities feel that by 2030, nearly 40 percent of all Americans will be members of minority groups (Ibid.). It is critical that all minorities are given the chance to become well-educated professionals so that their interests are represented and they may participate in the democratic process. The editor for *Black Issues in Higher Education* reminds us that this country "still needs the Thurgood Marshalls of the world"; further, "law schools, not only affiliated with Historically Black Colleges and Universities, must train and produce lawyers of color who will stay connected to the minority community and be active in legal issues that affect minorities" (Hurd, p. 6).

In this writer's mind, there is no question as to if higher education should continue using affirmative action as a factor for admissions. There is more than enough evidence to support the benefits of diversity on campus in our ever-increasingly diverse society. We must therefore continue to honor the position of the American Council on Education: "To impose new prohibitions against affirmative action in admissions decisions would be devastating to the effort to achieve and maintain diversity within our student bodies and, ironically, would be a serious intrusion into institutional autonomy at a time when many in government and academe are demanding precisely the opposite" (American Council on Education, 2001). Colleges and universities have succeeded in this

country because they have been able to set their own agenda and standards. They also have been successful in producing contributors to the economic, political and social well-being of society. In a country that values freedom of choice, colleges and universities should retain their freedom to choose (J. Toller, personal communication, May 8, 2001). Today's leaders in higher education must be willing to stand firm with a goal of providing the best possible learning environment, both in and out of the classroom, for tomorrow's student body. The use of affirmative action helps everyone achieve that goal. Hopefully, by the summer of 2003, the Supreme Court will be able to provide guidance regarding how diversity can be legally pursued within the scope of the Equal Protection Clause of the 14th Amendment.

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